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Joint written statement* submitted by the International Organization for the Elimination of All Forms of Racial Discrimination (EAFORD), Indian Movement "Tupaj Amaru", International-Lawyers.Org, IUS PRIMI VIRI International Association, non-governmental organizations in special consultative status, International Educational Development, Inc., World Peace Council, non-governmental organizations on the roster

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 May 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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South-Eastern Mediterranean: The Incorporation of the EU Asylum Directives in the South-Eastern EU Countries*

The purpose of *Directive 2013/32/EU* of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (hereinafter Directive 32) and *Directive 2013/33/EU* of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereinafter Directive 33) adopted in June 2013, is to establish common procedures for the reception of applicants for international protection and for granting and withdrawing international protection.

The Directives introduce a number of positive changes, which if correctly transposed and implemented in practice will lead to improved and equal reception standards and treatment for many asylum seekers throughout the EU.

Member States are under an obligation to transpose and implement these Directives in a manner which is consistent with international and EU law. The Directives left considerable room for manoeuvre to Member States regarding their transposition. The four south-eastern EU countries (namely Greece, Malta, Cyprus and Italy) have all taken legislative action in order to incorporate the Directives into their national legislation.

- **Greece**

Greece has transposed Directive 32 into its national legal order through Law 4375/2016 and Law 4399/2016. There is no prerequisite under Greek law that safety criteria of "safe third country notion" are taken into account when examining whether a country qualifies as a "first country of asylum"[1].A possible repercussion is that an application may be considered inadmissible on the ground of first country of asylum even if said country, in the current context Turkey, does not satisfy the criteria of a "safe third country".

Regarding Directive 33, hitherto, only Articles 8-11 have been incorporated in the Greek legal order, although the deadline for the transposition has expired since July 2015.[2] The provisions, which have already been transposed, relate to the detention of asylum seekers and do not provide adequate safeguards for asylum seekers. There are serious concerns regarding the notion of "the risk of absconding", which is defined as a reason for detention. Following the EU-Turkey statement, it has been observed that upon arrival all migrants in the Greek islands are detained on presumed risk of absconding. This risk constitutes an "automatic assumption and is not supported by any specific documents."[3] Such automatic assumptions should be avoided and an individual case assessment should be carried out.[4] The EU-Turkey statement was meant to be "a temporary and extraordinary measure... necessary to end the human suffering and restore public order"[5]. Nevertheless, two years after its release, it has become a steadfast phenomenon, which, among others, reinforces the containment policy in the Greek islands, while the human suffering it was meant to address is still present.[6] Furthermore, "public order" grounds have been extensively used to justify detention. Notably, such detention orders are scarcely properly justified.[7]

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1 Article 19(2) Presidential Decree 113/2013

2 See Directive 33 Article 31

3 Fundamental Rights Agency, Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy, December 2016, 48-49.

4 EU Commission, Return Handbook, p 12

5 EU-Turkey Statement, 18 March 2016, paragraph 5, available at: http://bit.ly/2tk5u0r

6 Joint Statement of 9 Greek Organizations, Almost two years after EU-Turkey statement, people are still trapped on the islands, 6 March 2018, available at: http://bit.ly/2H7xPcv

7 Greek Ombudsman, Document 171931/37998/2013 and Return of third-country nationals: Special Report 2014, May 2015, available in Greek at: http://bit.ly/2k40chi at 4; See also UNHCR, Greece as a Country of Asylum - UNHCR's Recommendations, 6 April 2015, available at: http://bit.ly/2ke9lpA at VI (10)

- **Malta**

Malta has transposed Directive 32 throughout Legal Notice 416/2015. Legal Notice 416 incorporates the Directive in the national legal order with minimum amendments. It appears that the amendments made, reinforced the national legislation, which is now able to meet the needs of asylum seekers in the country.

Malta transposed Directive 33 throughout Legal Notice 417/2015. The definition of family members under Article 2 is problematic; it fails in recognizing family bonds which may have been created subsequently to departure from the country of origin, for instance during or after flight, or in refugee camps. Furthermore, it is stipulated that in case that applicants have sufficient resources or have been working for a reasonable period of time, they might be required to cover or contribute to the cost of the material reception conditions and of the health care provided for in these regulations.[8] However, the notions of "sufficient resources" and "reasonable period of time" are very vague and require further elaboration by the Maltese legal order. For this determination it is crucial that Maltese legislation provides for an assessment of risk of destitution, made prior to the decision-making.

The same applies to access to health care; there is no minimum threshold regarding the level of health care that should be ensured. One further deficiency in the Maltese law is that although it dictates that the level of material reception conditions should ensure a standard of living adequate for the health of asylum seekers, it does not determine adequately this level.

- **Cyprus**

Cyprus has transposed both Directives through Laws 105(I)/2016 and 106(I)/2016. Article 31(3)-(5) of Directive 32 have not yet been incorporated in the national legal order.

A first deficiency of the Cypriot law is that it provides that for applications made before 20 July 2015, the judicial review confines in examining points of law, but not facts. Therefore, applicants who have lodged their application prior to this date do not have access to an effective remedy. Additionally, access to free legal assistance is rarely provided to applicants in practice, rendering the procedure inaccessible for applicants with no financial means. Additionally, there are no guarantees for persons who attempted to file an application, but were not able to do so.

In order for material reception conditions to be provided, the asylum seeker has to submit an application, by presenting a confirmation that the application has been made.[9] While this confirmation might take up to 9 days to be issued subsequently to the making of an application,[10] it is evident that the Cypriot legislation is problematic in terms of provision of material reception conditions to persons of concern during the first crucial days subsequently to their arrival in EU territory.

Another vacuum in the Cypriot legislation is that although it prohibits the detention of asylum seeking minors, there are no safeguards provided for other vulnerable groups.

- **Italy**

Italy has transposed Directive 32 into its national legal order throughout Legislative Decree 142/2015 and Law 46/2017. An apparent deficiency in Italian asylum legislation is the right to appeal. Although asylum seekers have access to a judicial body, which examines their application both in facts and in law, this judicial body is already overloaded with cases. Another problematic aspect of the appeals procedure is that applicants placed in detention facilities and those under the accelerated procedure have only 15 days to lodge an appeal,[11] namely half of the time limit provided to applicants under the regular procedure. This provision hampers the right to judicial access and to a fair trial, as protected under Article 6 of the ECHR.

8 Legal Notice 417, Article 11 (5)

9 Refugee Law Article 9IA (3), as amended by Law 105(I)/2016, Article 12

10 Refugee Law Article 8 (1) (a), as amended by Law 105(I)/2016, Article 10 and Refugee Law Article 11 (4) (a), as amended by Law 106(I)/2016

11 Article 27 LD 142/2015

Italian law foresees no obligation for asylum seekers to appear before the judges, allowing for the judges' decision to be based on the video-recording of the applicants' interviews. As a result, asylum seekers' right to defence is substantially curtailed. Notably, there is no legal provision for free legal assistance during the first instance.

Regarding the reception of applicants, there is no uniform system. Some notable deficits of the law is that it does not provide a definition of "adequate standard of living and subsistence" and does not envisage specific financial support for different categories, such as people with special needs. Moreover, it does not provide any financial allowance for asylum applicants needing accommodation. This results in overcrowded facilities, since every applicant attempts to secure a place in the reception centres.

Conclusion and recommendations

It seems that the Directives have indeed provoked important amendments in the legislations of the south-eastern EU countries. It must be understood by all Member States that the present humanitarian crisis, which is taking place so close to Europe's borders, constitutes one of the gravest humanitarian crisis in history.

The full and correct incorporation of the Directives in the national legal orders of the South-Eastern EU Member States constitutes an imperative need and the undersigning organizations urge that more action is taken immediately towards this direction.

To this end they suggest that:

-Greece urgently takes legislative action in order to fully incorporate Directive 33 into its national legislation. It is also an imperative need that Greece reviews its current legislation regarding the detention of applicants seeking international protection;

-Malta amends its legislation to broaden the definition of family members, clarify the notions of "sufficient resources" and "reasonable period of time" and sets a minimum threshold for the provision of health care;

-Cyprus regulates the judicial review of applicants who have lodged an application prior to 20 July 2015. It should also provide guarantees for persons who have attempted to file an application, but have failed to do so. Cyprus should also amend its legislation for material reception conditions to be provided to asylum seekers during the first days subsequently to their arrival and provide guarantees for vulnerable persons to not be detained;

-Italy amends its whole judicial review system and elaborates on the notion of "adequate standard of living and subsistence" and envisages specific financial support for different categories, such as people with special needs;

-The Special Rapporteur on the human rights of migrants makes specific reference to the situation in South-Eastern Europe and makes recommendations for the amelioration of the human rights conditions of asylum seekers in the area.

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*Geneva International Centre for Justice (GICJ), The Arab Lawyers Association-UK, Human Rights Defenders (HRD), The Brussells Tribunal, The Iraqi Commission for Human Rights (ICHR), Association of Humanitarian Lawyers (AHL), Association of Human Rights Defenders in Iraq (AHRD), General Federation of Iraqi Women (GFIW), Organisation for Justice & Democracy in Iraq (OJDI), The Iraqi Centre for Human Rights, The International League of Iraqi Academics (ILIA), Iraq Solidarity Association in Stockholm, NGO without consultative status, also share the views expressed in this statement.